

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2021-291-A

IN RE: Generic Docket to Study and Review Prefiled) **PETITION FOR**
 Rebuttal and Surrebuttal Testimony in) **RECONSIDERATION OF**
 Hearings and Related Matters) **ORDER NO. 2022-58**

Pursuant to S.C. Code Ann. Reg. 103-854, the South Carolina Office of Regulatory Staff (“ORS”), by and through counsel, hereby petitions the Public Service Commission of South Carolina (“Commission”) to reconsider Order No. 2022-58 Establishing Procedures for Submission of Surrebuttal Testimony issued in this docket on February 10, 2022 (“Petition”). In support of this Petition, ORS states the following:

BACKGROUND AND PROCEDURAL HISTORY

The Commission issued Directive Order No. 2021-661(A) on September 2, 2021, opening a generic docket to study and review prefiled rebuttal and surrebuttal testimony in hearings and related matters. On November 3, 2021, the Commission issued Directive Order No. 2021-736 asking “all interested stakeholders and persons to provide comment and thoughts on procedure, substance requirements, and timelines for pre-filed testimony and exhibits, including the need for pre-filed written rebuttal and/or surrebuttal testimony versus reserving rebuttal and/or surrebuttal testimony to be provided live during the hearing.” Various participants in this docket, including ORS, filed comments.

After receiving those comments, the Commission issued Order No. 2022-58, setting forth the following procedures effective immediately for surrebuttal testimony:

1. When developing the procedural schedule where pre-filed testimony is anticipated, the Commission Clerk's Office shall establish a deadline wherein an appropriate party may file a Motion to Pre-File Surrebuttal Testimony. The Motion shall be filed after any rebuttal testimony has been pre-filed, and shall provide the Commission with good cause, if any, as to why the party should be allowed to pre-file surrebuttal testimony in the specific case.
2. A date shall also be set for the pre-filing of surrebuttal testimony, should the Commission grant the Motion.
3. Should the Motion be granted for good cause, the surrebuttal testimony may be pre-filed. If good cause is not shown, the moving party may not pre-file surrebuttal testimony.

In the Order, the Commission referenced that rebuttal testimony is a matter of right whereas surrebuttal testimony is discretionary, citing *Palmetto Alliance, Inc. v. S.C. Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695 (1984). Additionally, Order No. 2022-58 provides the following reasons for the procedure adopted:

Surrebuttal testimony must be viewed as somewhat different from other testimony, because if presented, it comes at a point in a proceeding where the parties have submitted their direct exhibits and have also had an opportunity to respond to the other parties' testimony and exhibits. The theory and purpose of surrebuttal testimony is to respond to any new matters brought up by the moving party in its rebuttal testimony. However, if rebuttal is limited to responding to other parties' direct testimony, as intended, then surrebuttal testimony should rarely, if ever, be necessary. That is why, historically, surrebuttal testimony has only been presented as deemed necessary in the discretion of the Commission.

ARGUMENT

The Commission should reconsider Order No. 2022-58 in its entirety. Contrary to what is indicated in the Order, the Commission's historical practice has been to set a procedural deadline for and allow surrebuttal testimony to be prefiled. The practice was in place in 2004 when ORS was created and was part of the procedural schedule in a rate case that preceded ORS's existence.

Further, by including a deadline for surrebuttal to be filed, the Commission is not allowing surrebuttal into the record as of right. In addition, the procedure established by Order No. 2022-58 is less efficient and compresses even more the tight and limited timelines which often exist for Commission proceedings. The procedure adopted in Order No. 2022-58 also is inconsistent with the order of procedure set forth in Commission Regulation 103-842(B). Moreover, surrebuttal practice should not be revised without also addressing application and direct testimony requirements, and the change to surrebuttal testimony procedures described in Order No. 2022-58 should be effectuated through the rulemaking process for enacting a regulation. Should the Commission deny ORS's request to reconsider Order No. 2022-58 in its entirety, ORS asks that the Commission clarify that the procedure identified in Order No. 2022-58 does not apply to the 2022 electric fuel and purchased gas adjustment ("PGA") proceedings for which a procedural schedule was adopted in Order No. 2021-57 on February 1, 2021, and amend the new procedure to expressly permit or require parties to include their proposed surrebuttal testimony with the motion to allow surrebuttal.

A. Contrary to What Is Stated in Order No. 2022-58, the Historical Practice of the Commission Has Been to Include a Deadline for and Allow Parties to Prefile Surrebuttal Testimony.

In Order No. 2022-58, the Commission stated historically, surrebuttal testimony has only been presented as deemed necessary in the discretion of the Commission. However, this is incorrect, at least for recent history. The General Assembly created ORS through Act 175 enacted in 2004. A review of some of the prefile testimony letters the Commission issued for rate applications filed in 2004 demonstrates the Commission's practice was to include a deadline for prefiling surrebuttal testimony when establishing a procedural schedule. *See* Feb. 3, 2005 Letter in Docket No. 2004-357-WS; Feb. 1, 2005 Letter in Docket No. 2004-353-WS; and July 12, 2004

Letter in Docket No. 2004-178-E. In addition, an Order establishing prefiling deadlines issued in a rate case for a natural gas utility prior to ORS's existence includes a deadline for prefiling surrebuttal testimony. *See* Order No. 2002-566 in Docket No. 2002-63-G. This Order also stated the acceptance into the record of surrebuttal testimony and exhibits was subject to the discretion of the Commission, but the Order indicated no requirement for a motion to be filed and granted before the testimony was prefiled. Consequently, the procedure the Commission adopted in Order No. 2022-58 does not align with the Commission's recent history, but to the contrary, significantly alters a practice that predates ORS's existence.

B. The Commission Is Not Allowing Surrebuttal Testimony to Be Entered into the Record as of Right.

In Order No. 2022-58, the Commission distinguished rebuttal testimony as being a matter of right whereas surrebuttal testimony is discretionary, citing *Palmetto Alliance, Inc. v. S.C. Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695 (1984). While the South Carolina Supreme Court states this general proposition in its opinion, the Commission below had provided an opportunity to present surrebuttal evidence. *See id.* at 439, 219 S.E.2d at 700. By including a deadline for surrebuttal testimony in procedural schedules, the Commission is not allowing surrebuttal testimony as of right. It is simply providing a deadline to prefile such testimony for consideration to be entered into the record. The testimony does not become part of the record of a proceeding until it is entered into the record, typically through the witness taking the stand at a merits hearing. Parties can review the prefiled surrebuttal testimony in advance of the hearing and if it exceeds the proper scope, move to strike or object to its introduction into the record. *See* S.C. Code Ann. Regs. 103-829, 103-849. If a motion is granted or objection sustained, the proffered testimony never becomes part of the evidentiary record.

C. The Procedure Established by Order No. 2022-58 Is Less Efficient and Unnecessarily Compresses Further the Already Tight Timeframes that Often Exist in Commission Proceedings.

The procedure established in Order No. 2022-58 whereby a motion to prefile surrebuttal testimony must be filed and granted before the surrebuttal testimony is prefiled is less efficient and compresses further the already tight window of time that often exists between when an application or petition is filed with the Commission and when a final order must be issued. For example, in general rate proceedings, the Commission has only six months from the Application date to issue a final order for proceedings that are often very complex. *See* S.C. Code Ann. §§ 58-5-240(C); 58-27-870(B). ORS has the sole statutory responsibility to make inspections, audits, and examinations of public utilities regarding matters within the Commission's jurisdiction. S.C. Code Ann. § 58-4-50(A)(2). Six months is a very compressed timeframe for completing these inspections, audits, and examinations. Likewise, six months is a very limited amount of time for the work all parties or the Commission must undertake in these proceedings, including complex discovery, outside expert engagement, preparation and filing of testimony, reviewing testimony, preparing and deciding any motions, engaging in settlement discussions, preparing for and participating in hearings, drafting proposed orders, and issuing a final order. Further, the Commission has indicated concerns recently about the amount of time between the merits hearing and final order deadline becoming even more compressed in recent rate cases.

Under the procedure adopted in Order No. 2022-58, the Commission will need to build into procedural schedules sufficient time for parties other than the applicant or petitioner to review rebuttal testimony, decide whether to request the ability to prefile surrebuttal testimony, and prepare and file a motion describing the reasons surrebuttal testimony is needed. Sufficient time also will need to be included for responses and replies related to any such motion, for the

Commission to rule on the motion, and if surrebuttal is allowed, for parties to file the surrebuttal testimony. The deadline under Commission Regulations for a response to a motion is ten days from the date of service of the motion, and for replies, the deadline is five days after service of the response. S.C. Code Ann. Reg. 103-829. Because parties will not know how much time will be permitted to prefile the testimony assuming a motion to prefile is granted, parties necessarily will need to have their witnesses proceed with preparing their testimony while the motion is being drafted and is pending Commission decision. For experts, this will mean additional expense associated with preparing testimony that may never even be permitted to be prefiled.

In addition, not including a deadline to prefile surrebuttal will lead to even more motions to strike rebuttal testimony. Under the procedure that existed prior to January 27, 2022, ORS and intervenors had the ability to respond to rebuttal testimony that was questionable as to whether it was outside the scope of proper rebuttal through prefiling surrebuttal testimony instead of moving to strike. Because parties will not know if they will be permitted to prefile surrebuttal testimony, this likely will necessitate the need for parties to take steps to protect themselves through more motions to strike questionable rebuttal testimony, in addition to requesting leave to prefile surrebuttal testimony.

D. The Procedure Adopted by the Commission Is Inconsistent with the Order of Procedure Set Forth in Commission Regulation 103-842(B).

The order of procedure for applications and petitions set forth in Commission Regulation 103-842(B) states that evidence shall ordinarily be received in the following order: (1) applicant or petitioner; (2) other parties; and (3) ORS. The Commission consistently has adhered to the order of procedure set forth in this Regulation, and it is long-standing practice for ORS to present its evidence last.

The procedure the Commission adopted in Order No. 2022-58 alters this long-standing practice and makes it more likely that ORS will not present its evidence last and that other parties will not present their evidence after the applicant or petitioner. The Commission generally allows parties the option to present their direct and rebuttal or direct and surrebuttal testimony together or separately at the merits hearing. If surrebuttal is not allowed, for hearings where the applicant or petitioner decides to separate its direct and rebuttal, ORS will not present its evidence last and other parties will not present their evidence after the applicant or petitioner. Rather, the applicant or petitioner will be permitted to present evidence first and last. Two utilities in their comments letter expressly asserted the Commission should preserve the option of presenting direct and rebuttal separately. DEC, DEP Letter filed Nov. 17, 2021. This creates a significant strategic advantage for applicants and petitioners who now can present their cases initially through their applications or petitions, first at the merits hearing through direct testimony, and last at the hearing through rebuttal while ORS and other parties may only have the chance to present their cases through direct. Although most applicants or petitioners have chosen in the past to present their direct and rebuttal together, there is a strong likelihood this practice will change in contested hearings and that more applicants and petitioners will choose to separate their testimony to use the strategic advantage granted them by being able present evidence first and last. This also will have the effect of mitigating or eliminating any perceived efficiencies in hearing length associated with not having surrebuttal.

E. Altering the Process for Surrebuttal Testimony Without Also Addressing Application and Direct Testimony Requirements Creates a More Uneven Playing Field.

Directive Order No. 2021-736 inviting comments in this docket references that “often the substance of Direct Testimony and Exhibits may not be as robust in evidentiary support and explanation of an applicant’s petition or application and that the Rebuttal Testimony may contain

more substance and evidentiary support than the Direct Testimony.” Various commissioners at other times have offered similar comments. This lack of substance to the direct testimony and exhibits of applicants and petitioners and subsequent inclusion of more substance and evidentiary support in rebuttal testimony often is what necessitates the filing of surrebuttal testimony. Indeed, the utility is the only party with full information about what it is requesting from the Commission, and it is entitled to a presumption of reasonableness with respect to costs that are not challenged. *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-10, 708 S.E.2d 755, 762-63 (2011). If applicants provide an application and/or direct testimony lacking substance—which they may have a strategic incentive to do—surrebuttal has been a major procedural tool and safeguard to allow other parties a meaningful opportunity to address important issues identified during their reviews and which the applicant may only have addressed substantively for the first time in rebuttal testimony.

ORS in its comments letter filed in this docket agreed with the observation regarding rebuttal testimony expressed in Directive Order No. 2021-736 and recommended application requirements be increased and that substantive direct testimony be filed contemporaneous with any application which proposes new programs or an adjustment in rates, charges, terms and/or conditions. *See* ORS Letter filed Nov. 17, 2021. The South Carolina Department of Consumer Affairs (“DCA”) and Nonprofit Intervenors made similar recommendations in their comment letters. *See* DCA Letter filed Nov. 17, 2021; Nonprofit Intervenors Letter dated Nov. 17, 2021. ORS has further noted in the past that it has not been unusual for utilities to amend financial data, pro forma adjustments, and other supporting documentation after filing direct testimony. ORS Letter filed Nov. 17, 2021. Application requirements and the timing of applicant direct testimony have been topics of comments in Docket No. 2020-247-A, a docket in which the Commission held

a workshop specifically to discuss Application requirements and Commission Regulation 103-823 on April 5, 2021.

The procedure practiced since at least 2004 of including a procedural deadline for prefiling surrebuttal testimony without requiring a motion first cannot be viewed in isolation from the issues identified by ORS and other parties related to applications and the substance of applicants' direct testimony that have been discussed in this docket and Docket No. 2020-247-A. The issues mentioned in Directive Order No. 2021-736 about applicants including more substance and evidentiary support in rebuttal testimony than in direct testimony are often what lead to the need for surrebuttal testimony. By changing the procedural process for surrebuttal but not addressing these other issues, the problems are further aggravated. If the Commission wishes to make changes, all these interrelated issues should be addressed in combination at the same time to avoid creating any unfair advantage to any party to a proceeding.

F. The Change to Surrebuttal Testimony Procedures Described in Order No. 2022-58 Must Be Accomplished Through the Rulemaking Process for Enacting a Regulation.

Under the Administrative Procedures Act ("APA"), regulation is defined as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4). "Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016). The key inquiry is:

the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the

various cases that arise, then the agency action in question has not established a binding norm.

Id. (quoting *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 491, 636 S.E.2d 598, 618 (2006) (Toal, C.J., dissenting). “[W]hen there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA.” *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 329, 440 S.E.2d 375, 378 (1994).

Order No. 2022-58 appears to create a binding norm to be followed in any case where prefiled testimony is anticipated. It creates a process whereby a motion must be filed and granted for good cause shown before the surrebuttal testimony even can be prefiled with the Commission. No similar requirement exists for any other type of testimony. It is also unclear whether the Clerk’s Office is authorized to reject the filing of prefiled surrebuttal testimony if the process described in Order No. 2022-58 has not been followed. ORS agrees with the assertion in the comments letter Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) filed that “if the Commission wishes to change the current testimony filing requirements, it should initiate a rulemaking under the [APA] because doing so, without a rulemaking, would contravene S.C. Code Ann. Regs. 103-845(C).” DEC, DEP Letter filed Nov. 17, 2021, pp. 2, 5. Order No. 2022-58 constitutes a major change to well-established testimony practice before the Commission. Such a major change to practice before the Commission that appears to be intended to apply in every case where there is the possibility of prefiled testimony should be done through the rulemaking process, not a Commission Order issued in an administrative docket.

G. Even if the Commission Denies the Request to Reconsider the Procedure in Its Entirety, the Procedure Adopted in Order No. 2022-58 Should Not Apply to the 2022 Electric Fuel and PGA Proceedings Because Procedural Schedules for These Dockets Previously Were Established in Order No. 2021-57.

In July 2020, in Docket No. 2005-83-A, the Commission instructed its staff to establish a discussion group regarding possible modifications to procedural schedules of current fuel proceedings. *See* Directive Order No. 2020-474. The Commission held a virtual forum and received written comments. The resulting product of these efforts was Order No. 2021-57 adopting a procedural schedule for electric fuel and PGA proceedings in 2021 and 2022.¹ Exhibit A to Order No. 2021-57 contained deadlines for prefiling direct, rebuttal, and surrebuttal testimony. Neither the Order nor the exhibit requires or even mentions a requirement to file a motion to prefile surrebuttal testimony.² The interval between rebuttal and surrebuttal for all these proceedings is only seven days.³

The Commission Clerk's Office issued, on February 4, 2022, a prefile testimony letter in the 2022 PGA proceeding for Piedmont Natural Gas Company, Inc. ("Piedmont"), which is

¹ The docket numbers for the 2022 fuel and PGA proceedings are 2022-1-E, 2022-2-E, 2022-3-E, 2022-4-G, and 2022-5-G. In Docket No. 2022-2-E, the Commission issued Order No. 2022-12-H on February 16, 2022, confirming that permission does not need to be requested prior to filing surrebuttal testimony and exhibits. The prefile testimony letter issued by the Commission Clerk's Office on December 7, 2021, in Docket No. 2022-1-E includes no deadline or requirement for filing a motion before prefilng surrebuttal testimony. In Docket No. 2022-4-G, the Commission Clerk's Office issued a prefile testimony letter on February 4, 2022, which has a deadline for filing a motion to prefile surrebuttal testimony one day after the deadline for the utility's rebuttal and six days before surrebuttal testimony would be due. Under Order No. 2021-57, Docket No. 2022-3-E is scheduled to be noticed at the end of March and Docket No. 2022-5-G is scheduled to be noticed in mid-June so no prefile testimony letters have been issued in these dockets.

² DEC and DEP filed a petition for reconsideration of Order No. 2021-57 regarding the procedural schedules established for the two companies' fuel proceedings. DEC and DEP asserted that the schedules should contain additional time between the surrebuttal deadline and the date of the hearing. In Order No. 2021-357 denying the petition for reconsideration, the Commission stated that surrebuttal testimony is discretionary with the Commission. However, the Commission did not alter the procedural schedule established in Order No. 2021-57 or order that a motion to prefile surrebuttal testimony must be filed.

³ Exhibit A to Order No. 2021-57 has a scrivener's error in it regarding Docket No. 2022-4-G. It lists the surrebuttal deadline as June 20, 2022, and the rebuttal deadline as June 23, 2022. The surrebuttal deadline should be June 30, 2022.

assigned Docket No. 2022-4-G. The prefile testimony letter has a deadline for filing a motion to prefile surrebuttal testimony one day after the deadline for Piedmont's rebuttal and six days before surrebuttal testimony would be due.

The procedure described in Order No. 2022-58, which states the procedure applies immediately when the Commission Clerk's Office is developing a procedural schedule, should not apply to the PGA and electric fuel proceedings in 2022. The procedural schedules for these dockets already were established in Order No. 2021-57 after parties had the opportunity to submit comments and participate in a virtual forum. Furthermore, if a motion to prefile surrebuttal testimony will be required, all the dates in these dockets will need to be revisited to allow additional time for that process because the seven days currently between rebuttal and surrebuttal is not sufficient. Moreover, setting a deadline for filing a motion to prefile surrebuttal testimony one day after rebuttal is due as occurred in Docket No. 2022-4-G is unreasonable and prejudicial, particularly considering the testimony may not be filed until late the preceding day. A party must have a reasonable period of time to review the rebuttal testimony, make a determination regarding whether surrebuttal is needed, and then prepare and file a motion that explains the basis for why surrebuttal is needed. ORS filed a separate request in Docket No. 2022-4-G, with Piedmont's consent, to remove the requirement and deadline for filing a motion to prefile surrebuttal testimony from the procedural schedule. That request remains pending.

In addition, Order No. 2021-57 directed the Clerk's Office to use the schedule formula or time periods between prefiled testimony, hearing, and proposed orders established by the schedule for years 2021 and 2022 for years following 2022. If the procedure adopted in Order No. 2022-58 is kept, the scheduling for the annual fuel and PGA proceedings, which already was the subject

of recent comments and a virtual forum in Docket No. 2005-83-A, will need to be revisited for purposes of future years proceedings.

H. If the Commission Denies this Petition, It Should Then Alter the Procedure Adopted to Expressly Permit or Require the Proposed Surrebuttal Testimony to Be Filed with the Motion to Allow It.

If the Commission denies this Petition for Reconsideration, it should then alter the procedure adopted in Order No. 2022-58 to expressly permit or require parties to include their proposed surrebuttal testimony with the motion to allow it. Such a procedure would be more administratively efficient than that adopted in Order No. 2022-58 under which current scheduling practices would need to be modified to allow time for a motion to be filed, responses and replies, and then a ruling on the motion. After all of this, if the motion is granted, time would then need to be allowed for the filing of the surrebuttal testimony. If parties are permitted to file the proposed surrebuttal testimony with the motion to allow it, the Commission generally could maintain its current practices for scheduling intervals between rebuttal and surrebuttal. Parties simply would file a motion with the proffered surrebuttal. In addition, the Commission would have the proffered testimony to review in connection with ruling on whether to allow it. When setting deadlines, the Commission would need to bear in mind that there needs to be enough time between when rebuttal is filed and the motion for surrebuttal is due for parties to prepare the surrebuttal testimony to include with the motion. ORS acknowledges a downside to requiring the proffered surrebuttal testimony with the motion is that parties will need to incur the expense for experts to prepare surrebuttal testimony not knowing if the motion will be granted. However, ORS anticipates parties will have their experts preparing testimony while the motion is pending even if the testimony cannot be filed with the motion because parties will not know how much time they will be permitted to prepare and prefile the testimony if the motion is granted.

CONCLUSION

For the reasons set forth herein, ORS respectfully requests the Commission reconsider the procedure adopted in Order No. 2022-58 in its entirety. If the Commission denies the request to reconsider the procedure in its entirety, ORS requests that the Commission clarify that the procedure does not apply to the 2022 electric fuel and PGA proceedings for which a procedural schedule previously was adopted in Order No. 2021-57 and amend the procedure to expressly permit or require parties to include their proposed surrebuttal testimony with the motion to allow the testimony.

Respectfully submitted,



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March 2, 2022
Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2021-291-A

IN RE: Generic Docket to Study and Review Pre--)
 filed Rebuttal and Surrebuttal Testimony in) **CERTIFICATE OF**
 Hearings and Related Matters) **SERVICE**

This is to certify that I, Vicki L. Watts, have this date served one (1) copy of the **SOUTH CAROLINA OFFICE OF REGULATORY'S PETITION FOR RECONSIDERATION OF ORDER NO. 2022-58**, in the above-referenced matter to the person(s) named below by causing said copy to beelectronically mailed, addressed as shown below:

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March 2, 2022